

ACCESS TO EMPLOYMENT FOR PERSONS WITH DISABILITIES: THE CASE OF KENYA.

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DEDICATION

To God for taking me through this long road and my Family for the constant encouragement and support.

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I would like to express my sincere gratitude to my supervisor Mr. Desmond Tutu for his guidance and support. I also recognize the comments of Anne Kotonya during the defense of the proposal.

DECLARATION

I, ESTHER NYAGUTHII NJOROGI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Mr. Desmond Tutu

Strathmore Law School

ABSTRACT

This study sought to investigate access to employment by PWDs in Kenya, the law surrounding the issue of disability, the factors impeding the application of these set out laws and to come up with recommendations on the ways in which the state of persons with disabilities (PWDs) can be improved within the employment sector.

The study was done through assessing the adequacy of the current legal framework in curbing discrimination faced by PWDs in accessing employment. It established that the laws in place create a sound legislative framework, that at its current state should, to a larger extent, protect the right of PWDs to accessing employment save for various loopholes in the law. Through brief case studies of good anti-discrimination practices and laws, the study was able to bring out the prominent features of practices that allow PWDs to effectively access employment. Reasonable accommodation of PWDs was seen as a major factor that would contribute to allowing PWDs to confidently access employment.

In order for PWDs to access and secure employment in Kenya, the study recommends that the barriers hindering the application of the laws concerning disability be dealt with. It also proposed that the government should take initiatives to obligate employers to make reasonable accommodation. In the end, the study makes the findings that the laws pertaining to PWDs are sound, save for some loopholes, but a more pragmatic way of approaching the subject should be considered. Through case studies of other legal frameworks that are purportedly better in other jurisdictions, the study was able to bring out the prominent features that are necessary for a sound system of laws that would sufficiently ensure PWDs the right to employment without hindrances. The study then recommends various changes aimed at curbing this discrimination.

LIST OF ABBREVIATIONS

PWDs	Persons with Disabilities
CRPD	United Nations Convention on the Rights of Persons with Disabilities
NCAPD	National Coordinating Agency for Population and Development
KNBS	Kenya National Bureau of Statistics
NCPWD	National Council for Persons with Disabilities
ADA	American with Disabilities Act
DDA	Disability Discrimination Act
DPOs	Disabled People's Organizations
UDPK	United Disabled Persons of Kenya

LIST OF CASES

Paul Pkiach anupa & another v attorney general & another [2012] eKLR

Foley v Interactive Data Corp (1988) CAL. RPTR 211

Duncan Otieno Waga v hon. attorney general

Fredrick Gitau Kimani v The Attorney General (2012) eKLR

CHAPTER 1

1.0 Background of the Problem.

PWDs in Kenya make up a sizeable aggregate of the existing 47 million inhabitants. The World Disability Report of 2011 provides that out of the general population, 15% of those persons are those with disability. The overall disability rate in Kenya, according to the Kenya National Survey for persons with disabilities that was carried out in 2007 by the NCAPD in collaboration with KNBS, is 4.6%, which translates to 1.7 million PWDs. PWDs in Kenya represent a group of persons that have for many years experienced discrimination. These persons also experience limited or no access to essential socio-economic services such as those of education, health and most important to the present paper, employment.¹ More pertinent to our discussion is the issue of access to employment. This is seen as a critical matter that requires further discussion as it is central to one's existence and dignity especially in this modern economy.²

Such concerns of access to employment are greatly hinged on the availability of legal assurances that would help curb discrimination associated to access to employment. The Constitution of Kenya 2010 provides for PWDs. Article 27(3) of the Constitution guarantees equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 27(4) and (5) prohibits discrimination on any ground, inter alia disability. This includes discrimination in employment and labor relations. Article 27(6) requires the State to take measures of a legislative nature and other measures that may be relevant, such as those including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination, in order to give allow for the realization of the various rights provided for in this Article. In addition, Article 54 of the Constitution recognizes the concept of reasonable accommodation by providing that a person with any disability is entitled to inter alia, facilities for PWDs that are integrated into society to the extent compatible with the interests of the person and to reasonable access to all places, public transport and information. This article also provides for access for PWDs. It is therefore crucial for PWDs to be integrated into society, including integration into employment relations.

¹ Kenya National Commission on Human Rights, *'From norm to practice: Status report on implementation of the rights of persons with disabilities in Kenya'*, 2014, 5.

² *Foley v Interactive Data Corp* (1988) CAL. RPTR 211.

The Persons with Disabilities Act, No. 14 of 2003 is a piece of legislation that covers the rights of PWDs and the idea of equal opportunities in areas such as those of employment.³ The Act provides a solid enough framework, save for some weaknesses, for ensuring accessibility and the inclusion of PWDs in all facets of life. It prohibits discrimination in employment, education and health amongst other core areas of life as a method for accomplishing the equality of opportunities.⁴

Despite these and many other legislative materials, PWDs have continued to experience discrimination when accessing employment.⁵ The same was exemplified in the recent case of *Paul Pkiach Anupa & another v attorney general & another* where the aspect of reasonable accommodation was mentioned as a factor that needs to be greatly considered for PWDs as this hinders a PWD from accessing employment.⁶

1.1 Statement of the Problem.

Although the Constitution of Kenya and other legislative material provides a sound framework to address issues concerning discrimination of PWDs in accessing employment, such persons continue to face this injustice.⁷ Discrimination has led to high levels of unemployment or little engagement in economically viable activities among PWDs⁸ and even with an existent system of rules and regulations that make assurances for the rights of PWDs, access to employment and work still seems like an inaccessible objective for PWDs.⁹ Thus the issue to consider is whether the law is sufficient in addressing disability based discrimination when accessing employment and what other measures are necessary to curb this injustice.

³ International Labor Organization, Decent work for people with disabilities: Inclusion of people with disabilities in Kenya, 2009, 2.

⁴ Kenya National Commission on Human Rights, 'From norm to practice: Status report on implementation of the rights of persons with disabilities in Kenya', 2014, 2.

⁵ Kenya National Commission on Human Rights, 'From norm to practice: Status report on implementation of the rights of persons with disabilities in Kenya,' 2014, 3.

⁶ Paul Pkiach Anupa & another v attorney general & another [2012] eKLR.

⁷ Kenya National Commission on Human Rights, 'From norm to practice: A status report on implementation of the rights of persons with disabilities in Kenya,' 2014, 34.

⁸ Kenya National Commission on Human Rights, 'From norm to practice: Status report on implementation of the rights of persons with disabilities in Kenya,' 2014, 37.

⁹ Kenya National Commission on Human Rights, 'From norm to practice: Status report on implementation of the rights of persons with disabilities in Kenya,' 2014, 49.

1.3 Justification of the problem.

As indicated by the Population and Housing Census report of 2009,¹⁰ Kenya has an aggregate populace of 38, 610, 097. As indicated by the Kenya National Population Census of 2009, the rate of disability in Kenya is 3.5%.¹¹ This translates to 1,330,312 million PWDs. Further to this, only 33.3% (1.48 million people) of the population of PWDs are employed while in contrast, 40.4% (23.06 million people) of the total population of citizens are employed.¹² This clearly shows that fewer PWDs have joined the employment sector as compared to the total amount of persons within the actual sector.¹³

The results from the study can be espoused in the development of approaches, for the improvement of the legislative framework for PWDs. The results from this study can also influence policies that regulate the development and delivery of assistance in support services for PWDs. The researcher believes that this study will assist policy makers and the relevant government departments in coming up with policies that will inform the legal framework to resolve this particular problem.

1.4 Statement of objectives.

Below are the research objectives:

1. To assess the legal framework that governs the access to employment for PWDs.
2. To suggest reforms that can help address the issues that arise in accessing employment for PWDs.

1.5 Research questions.

These are;

1. What is the situation currently on the rights of PWDs in the securing of employment opportunities and the nature of the law that regards them?
2. Does the current law address the issue of securing of employment for PWDs?

¹⁰ http://www.knbs.or.ke/index.php?option=com_phoca_download&view=category&id=2:2009-census-documents&Itemid=637 Last viewed on 1/16/2017.

¹¹ http://www.knbs.or.ke/index.php?option=com_content&view=article&id=155:number-of-persons-with-disability&catid=112&Itemid=638 Last viewed 1/16/2017.

¹² <http://www.globaldisabilityrightsnow.org/infographics/disability-kenya>. Last viewed 1/15/2017.

¹³ Kenya National Commission on Human Rights, 'From norm to practice: Status report on implementation of the rights of persons with disabilities in Kenya,' 2014, 38.

3. What is the adequacy of the law in curbing discrimination in instances where PWDs try to access employment opportunities?

1.6 Literature Review.

Randall Owen and Sarah Parker Harris in their work titled ‘No rights without responsibilities’ shows the importance of the participation of PWDs in labor markets.¹⁴ Although limiting their analysis of the situation in the United Kingdom, the two authors observe that the reasons for the low employment status of PWDs include working in unsecured work positions, low levels of qualifications, and that work and employment is viewed in a limited sense as consisting of wage labor, this is to say that, employment is seen to only focus on the maximization of profit for the employer and competition between the individuals employed to work.¹⁵ Generally, they express the view that employment is a two part idea which is in one area about rights and participation in society, while the other side of it is about reducing welfare expenditures and activating beneficiaries. This idea, as will later be seen, is premised on the assumption that there are two main proponents, these are the proponents of disability rights and national Governments. Both view the increase of labor market participation of PWDs as a central goal, albeit for different reasons. Thus employment is a two part goal including rights and economic cooperation in the reduction of welfare.

Kevin Walker, in his piece, urges for change now. He posits that one cannot underestimate the importance of ensuring the rights of the PWDs globally. He goes further to state that there is no reason to wait twenty years to make changes to the law and that even in industrialized countries like in the United States, where the standard of living is high for the general population, ‘persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized under international law.’¹⁶ According to the author, Article 4 (2) of the Convention on the Rights of Persons with Disabilities keeps poorer countries from having to

¹⁴ Owen R and Parker S, ‘No Rights without Responsibilities: Disability Rights and Neoliberal Reform under New Labor’ 32(3), *Disability Studies Quarterly Journal*, 2012, 2.

¹⁵ Owen R and Parker S, ‘No Rights without Responsibilities: Disability Rights and Neoliberal Reform under New Labor’ 32(3), *Disability Studies Quarterly Journal*, 2012, 2.

¹⁶ Walker K, ‘Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Post-Secondary Education for Persons with Intellectual Disabilities’ 12(1), *Northwestern Journal of International Human Rights*, 16.

comply with articles that are not economically feasible for them to implement.¹⁷ Whereas the author limits his analysis to laws on disability in the United States, his views are quite relevant to the study at hand.

Cerise Fritsch in 'The right to work, A comparative look at China and Japan's labor rights for disabled persons' defends the idea that it is the duty of all states to protect and promote the inalienable rights and fundamental liberties of all, including the right to employment which not only offers an individual with means to support one's livelihood, but also provides an opportunity for social interaction, advancement, and feelings of self-accomplishment.¹⁸ The author argues that the right to work transcends the right to mere employment, and extends to the right to have a meaningful and gainful occupation, whereby a PWD has the opportunity to freely choose an occupation based on his or her capabilities. According to the author, in order to exercise this right, it is necessary to have access to the same education, vocational training, and development opportunities as are available to those without a disability.¹⁹ The author concludes that the deprivation of the right to work for PWDs, perhaps more so than for any other group in the society, results in complete exclusion from society, and greatly contributes to the poverty of a country.²⁰

1.7 Theoretical Framework.

The arguments in this study are premised on the neoliberal and inclusion theory. The first in our discussion is the neoliberal theory. The theory is characterised by many features. Some of the main and distinctively different features embodied in this type of theory is the assumption of an economy that embodies free choice for individuals. This allows the market to perform optimally.²¹ Therefore, persons within this system should be left free to make their own choices without any encumbrances or interference. In this case, interferences would include, the discrimination of PWDs that would stop this ideal environment from working as it should. The

¹⁷ Walker K, 'Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Post-Secondary Education for Persons with Intellectual Disabilities', 17.

¹⁸ Cerise Fritsch, 'The Right to Work? A Comparative Look at China and Japan's Labor Rights for Disabled Persons' 6(2), *Loyola University Chicago International Law Review*, 2009, 22.

¹⁹ Walker K, 'Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Post-Secondary Education for Persons with Intellectual Disabilities', 405.

²⁰ Walker K, 'Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Post-Secondary Education for Persons with Intellectual Disabilities', 406.

²¹ Kotz D, 'Globalization and Neoliberalism' 12(2), *Rethinking Marxism*, 2002, 65.

second theory that the present paper draws its premise from is the inclusion theory. The inclusion theory advocates for the involvement and treatment of all persons equally in a society.²²

1.8 Hypothesis.

The following hypothesis are tested in the study:

1. The existing legal framework is inadequate to enable PWDs to secure employment efficiently.
2. There are common patterns of discrimination that PWDs experience accessing employment opportunities.

1.9 Methodology.

This dissertation approaches the subject matter through literature review on PWDs. It uses primary and secondary sources in the review. The Constitution of Kenya 2010, statutes and policies constitute the primary sources which are significant for laying down the legal position in relation to the subject matter in Kenya. More specifically The Persons with Disabilities Act and the Employment Act have been analyzed. Books, journal articles, conference papers and online journals comprise of the secondary sources. The secondary sources document the studies of disability by various scholars.

As far as scope is concerned, this study will target the disabled. The research shall focus on physically impaired persons. The researcher will use secondary data which will be found from the internet, journals and books. Reliable websites have been referred to in abide to have updated information.

The study does not involve field activities for example, collection of data. This is due to the time constraints.

1.10 Limitations of the Study.

The study is limited to employees with physical disability. Employees with other disabilities, for example employees with mental, speech and other impairments, have thus not been included in the scope of this study. The findings of this study can thus not be generalized to other

²² Hodkinson A, 'Inclusion: A Defining Definition?' 3(2), *SAGE Journals*, 2011, 180.

people with disabilities but only to those with physical impairments.²³ This is to say that this study is limited only to those with physiology disorders and anatomical losses. The study is also specific to the challenges within the recruitment process and cannot be used in other instances of work place injury. The scope of the study is thus limited in this regard.

1.11 Chapter Breakdown.

The following chapters of this work are organized as follows:

1. Chapter 1 provides an introduction to the paper, the statement of the problem, the literature review, the objectives and questions, the hypothesis, the conceptual framework and the design methodology of the study.
2. Chapter 2 presents a review of the theoretical framework and literature review.
3. Chapter 3 details an analysis of the legal framework and the institutional framework that are involved in promoting access to employment of PWDs.
3. Chapter 4 presents a comparative analysis of practices of anti-discrimination in other jurisdictions in matters of employment.
4. Chapter 5 provides an in-depth discussion on factors relation to the low numbers of employed PWDs.
5. Chapter 6 presents the last chapter on the recommendations and conclusion of the dissertation.

1.12 Research time line

Chapter Two – Month of November 2016

Chapter Three – Month of December 2016

Chapter Four – Month of December 2016

Chapter Five – Month of January 2017

Chapter six – Month of January 2017

CHAPTER 2

LITERATURE REVIEW AND THEORETICAL FOUNDATION

2.0 Introduction

The subject of labor rights for PWDs has received considerable attention from various fields.²⁴ This chapter contains a review of the various literature and theories revolving around the rights to employment and correlated labor rights of PWDs.

2.1 Empirical Review

Richard opines that the various steps taken to persuade employers to hire PWDs are still greatly characterized by a combination of ‘sticks’ and ‘carrots’.²⁵ This is generally recognized as a system of policy that offers the players a combination of rewards and punishments in order to induce certain behaviour, that is, the employment of PWDs. He goes on further to explain the importance of the whole process that prepares job seekers for the employment search. He says that such processes even go further to even support the PWDs after the process of being hired. The author notes that what is mostly neglected is often unseen by the persons involved in the processes, these persons being those other than the PWDs. This issue commonly unseen is the need to create a suitable and conducive work place in order to cater for the needs of PWDs.²⁶ The author expresses the view that some employers show how companies make increased profitability by the inclusion of those with disabilities.²⁷ However, such employers do not make other necessary considerations that are key to the full participation of PWDs in employment. The author concludes that the end of the journey for disability employment initiatives would not simply stop at engaging employers and improving the employment outcomes of PWDs, where the so-called ‘job ready’ are the primary beneficiaries of these initiatives,²⁸ but it is the consideration of employing other persons who might not necessarily fit the mould, that is what is of greater importance. In addition

²⁴http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_90_en.pdf. Last viewed on 1/25/2017.

²⁵ Luecking R, ‘Emerging Employer Views of People with Disabilities and the Future of Job Development’ Vol. 29, 2008, *Journal of Vocational Rehabilitation*, 3.

²⁶ Luecking R, ‘Emerging Employer Views of People with Disabilities and the Future of Job Development’ Vol. 29, 2008, *Journal of Vocational Rehabilitation*, 4.

²⁷ Luecking R, ‘Emerging Employer Views of People with Disabilities and the Future of Job Development’ Vol. 29, 2008, *Journal of Vocational Rehabilitation*, 5.

²⁸ Luecking R, ‘Emerging Employer Views of People with Disabilities and the Future of Job Development’ Vol. 29, 2008, *Journal of Vocational Rehabilitation*, 11.

to this is that facilitating employment searches with PWDs in mind is key, particularly for those who require extensive support and accommodation, which this is seen to require a complete understanding of employee circumstances and that the lower rates of employment of PWDs will be caused by different factors such as those of environment friendliness and not on the employers' perceptions.²⁹ The author's views highlight on the need to determining each particular situation on its own basis while considering the nature of the employment and the situation of a potential employer.

On their part, Randall and Sarah firstly acknowledge the presence of the proponents of disability rights and those of national governments. They propose that these two sides both view that an increase in labor market participation of PWDs is a goal that is central to their ideals however this goal is propelled by varying different reasons. A reflection of the present from a disability perspective illustrates that employment is about rights and participation in society, while for national Governments, employment is about decreasing welfare expenditures and activating beneficiaries. Albeit restricting their analysis of the situation in the United Kingdom, the authors observe that the reasons for the low employment status of PWDs include the low levels of qualifications, precarious work positions, and that work and employment is viewed narrowly as consisting of wage labor, only focusing on the maximization of profit and competition between individuals.³⁰

Kevin posits that the need to cater to the rights of PWDs cannot be disparaged. He demonstrates that there is no reason to sit tight and wait for a considerable length of time to roll our improvements to the law by giving the case of the United States. The United States being a profoundly industrialized nation and where the standard of living is high for the general public, PWDs do not enjoy their rights fully in aspects of economics, socialism and the like.³¹ Therefore the journey to guaranteeing the rights of PWDs globally should already be underway. The author further posits that, Article 4 (2) of the CRPD keeps poorer countries from having to comply with

²⁹ Luecking R, 'Emerging Employer Views of People with Disabilities and the Future of Job Development' 29, *Journal of Vocational Rehabilitation*, 2008, 12

³⁰ Owen R and Parker S, 'No Rights without Responsibilities: Disability Rights and Neoliberal Reform under New Labor' 32, *Disability Studies Quarterly Journal*, 2012, 2.

³¹ Walker K, 'Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Post-Secondary Education for Persons with Intellectual Disabilities', 12, *Northwestern Journal of International Human Rights*, 16.

articles that they cannot economically feasible for them to implement.³² This may be seen as a factor for poorer countries' lag in allowing these rights to be realized. However, whereas the author limits his analysis to laws on disability in the United States, his views are quite relevant to the study at hand. He shows the Kenyan narrative can be changed and that it does not require a long wait for state actors and the like to change the law accordingly.

According to Marumoagae, although limiting his analysis to an examination of the South African labor market and PWDs, states that the challenges facing most employees within the labor markets and not just within South Africa can be attributed to inequality, discrimination and transformation. He asserts that key among such challenges in South Africa include the concept of accessibility, that the employer should ideally ensure the employees' access to the labor market and make the services and equipment easily usable by one who may have a disability.³³ The author opines that there have been difficulties that have arisen against the South African Government implementing critical steps to ensure that PWDs secure equality and accessibility within the employment environment. The paper highlighted certain challenges which relate to PWDs', these included the failure to make reasonable accommodation measures at work, inaccessibility in transportation and general levels of ignorance.³⁴ The author acknowledges that the exclusion of PWDs is still present due to negative attitudes towards them and the lack of economic resources which in turn contributes to the fact that PWDs remain among the most disadvantaged.³⁵ The author's views are a reflection of the scenario of the challenges faced by PWDs as the situation does not differ much with that of South Africa and Kenya.

On his part, Cerise opines that regardless of a state's underlying status on legal, economic or cultural standing, they should ensure and advance the basic rights of all persons. These rights include the right to employment which offers the individual a livelihood and self-achievement. The author observes that as at 2009, approximately 650 million individuals, or 10% of the total

³²Walker K, 'Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Post-Secondary Education for Persons with Intellectual Disabilities', 12, *Northwestern Journal of International Human Rights*, 17.

³³ Marumoagae M, 'Disability Discrimination and the Right of Disabled Persons to Access the Labor Market' 15, *PELJ*, 2012, 345.

³⁴ Marumoagae M, 'Disability Discrimination and the Right of Disabled Persons to Access the Labor Market, 2012, 347.

³⁵ Marumoagae M, 'Disability Discrimination and the Right of Disabled Persons to Access the Labor Market, 2012, 348.

populace, lived with a disability and they lacked equal opportunity to earn from employment and discrimination in the workforce. This, the author contends, results to continued marginalization, poverty and social exclusion of PWDs.³⁶ The author argues that the right to work is more than just a means to pass time but that it allows a person to gain more such as gaining a higher level of self actualization. According to the author, in order to exercise this right, it is necessary to have access to the same facilities such as education and others which are accessible to those without a disability.³⁷ Just like the present study, the author highlight on the importance of economic empowerment and the promotion of self-reliance among PWDs in general. The author does not however highlight on the situation in Kenya in regard to the realization of the labor rights of PWDs.

Fumitaka et al underscore the importance of creation of job opportunities for PWDs when they advance the argument that PWDs will only be able to lead a free and independent life without overdependence on other people when they have in their reach employment and a constant source of income.³⁸ Furthermore, that the goal of independent living has always been the increase of employability of PWDs and in addition, if PWDs depend, not on themselves, but on others, it would be nearly impossible for them to achieve their full self-worth.³⁹ Whereas they don't examine the Kenyan laws on the realization of the rights of PWDs, as the present study does, their insights lay emphasis on the need to include such persons in the work environment for the benefit of the country.

Rumit, just like Fumitaka et al, advances the argument for financial independence for PWDs as such persons need to live a dignified life. The author posits that PWDs have their own particular aptitude, abilities and capacities and if these are tapped into appropriately, they too can make noteworthy contribution in a country's advancement.⁴⁰ The author further views that an ideal environment for PWDs would be one that has no barriers and is one that is all inclusive. This environment, as the author suggests, would assume a critical part in making disabled persons

³⁶ Fritsch C, 'The Right to Work? A Comparative Look at China and Japan's Labor Rights for Disabled Persons' 6(2), *Loyola University Chicago International Law Review*, 2009, 403.

³⁷ Fritsch C, 'The Right to Work? A Comparative Look at China and Japan's Labor Rights for Disabled Persons', 405.

³⁸ Furuoka F, Lim B, Pazim K and Mahmud R, 'Employment Situation of Persons with Disabilities: Case Studies of US, Japan and Malaysia' 2, *Journal of Arts, Science and Commerce*, 2011, 2.

³⁹ Fumitaka Furuoka et al, 'Employment Situation of Persons with Disabilities: Case Studies of US, Japan and Malaysia' 2, *Journal of Arts, Science and Commerce*, 2011, 2.

⁴⁰ Ahmed R, 'Employment Rights for PWDs in India: A Critical Legal Perspective' 54(8) *Indian Labor Journal*, 2013, 783.

gainful by creating ample employment opportunities. Further to this the inclusion of reasonable accommodation in access to infrastructure and provision of aids and appliances would enable PWDs in employment to carry out duties effectively and as such, employment would in turn provide livelihood opportunities and self-reliance to them.⁴¹

Aaron et al on the other hand points out that while reliable data on the employment of PWDs worldwide is hard to get a hold of, available data demonstrates that the number of PWDs in employment are significantly lower than those without a disability. The authors identifies various models aimed at promoting the employment of PWDs actualized all through the world, this includes the incorporation of a sheltered model, which entails putting PWDs to work together in a segregated setting whereby they are trained and supervised by people without disabilities. In addition the supported model, which is an integrated model whereby PWDs are assisted throughout the employment process. In conclusion there is the customized model, whereby the employment of PWDs is individualized and their strengths, needs, and interests are determined.⁴² The models highlighted by the authors are important to this study and the same may be adopted in the recommendations for improving and promoting the right to access employment in Kenya by PWDs.

Finally, according to the International Labour Organization, in its evaluation of the situation pertaining to the realization of the labour rights of persons with disabilities in Kenya, within the Kenyan context, employment policies are not specific and do not therefore benefit people with disabilities, as such, specific laws should be enacted on job retention, assistive-devices, definition of disability, reasonable accommodation and training and the policies adopted should aim to promote the rights of people with disabilities in order for them to participate as fully as possible in society. Furthermore, policies should be backed by legislation such as a quota system, a central fund for promoting accessibility of workplaces and anti-discrimination/equity laws.⁴³ The ILO further observes that policies aiming to promote the rights of people with disabilities to full and equal participation in society, have been adopted by numerous Government

⁴¹ Ahmed R, 'Employment Rights for PWDs in India: A Critical Legal Perspective' 54(8), Indian Labor Journal, 2013, 783.

⁴² Mghill G, 'Employment of People with Disabilities' in JH Stone and M. Blouin (eds), *International Encyclopedia of Rehabilitation*, Center for International Rehabilitation Research Information and Exchange, U.S., 2008.

⁴³ International Labour Organization, *Employment of People with Disabilities: The Impact of Legislation* (International Labour Organization, Geneva, 2002), p. 17

throughout the world and in many countries, policy on employment opportunities for people with disabilities is frequently supported by legislation and implementation strategies as essential tools of integration. Additionally, that considerable attention has been paid in recent years to examining the provisions of different types of legislation such as vocational rehabilitation, quota legislation, anti-discrimination and employment equity legislation, and legislation to promote job retention and return to work of people with disabilities. However, less attention has been devoted to the question of the effectiveness of these laws in improving employment opportunities for disabled persons.⁴⁴

2.2 Theoretical Review

The arguments in this study are premised on the neoliberal theory and the inclusion theory.

2.2.1 The Neoliberal Theory

Neoliberalism was first evidenced in the late 1970s. This was as a response by political elites to the danger posed by the growing strength of organized labor in the more developed and industrialized countries. The neoliberal theory presents itself as a tenet based on the inexorable truths of modern economics. This theory allows us to backpedal to Adam Smith and his work, ‘The Wealth of Nations’. The crucial thought of Smith’s critique was that the ‘wealth of the nation’ was derived solely from the division of labor and that it was not from the accumulation of riches from the state as a whole entity and as a detriment to its and foreign powers. The division of labor developed as a result of the hard work of individuals who were free to apply their skills in order to gain returns.⁴⁵

In the previous case, the rise of unemployment meant that wage increment was halted and pressure was extended by the tariff reductions and liberalisation of capital streams.⁴⁶ Neoliberalism is supposed to free market forces and encourages private enterprise, consumer choice, and reward entrepreneurship.⁴⁷

⁴⁴ Luecking R, ‘Emerging Employer Views of People with Disabilities and the Future of Job Development’ Vol. 29, 2008, Journal of Vocational Rehabilitation, p. 37

⁴⁵ Clarke S, ‘The Neoliberal Theory of Society’ in A. Saad-Filho and D. Johnston (eds), *Neoliberalism: A Critical Reader*, Pluto Press, London, 2005), 1.

⁴⁶ Siddiqui K, ‘Developing Countries’ Experience with Neoliberalism and Globalization’ 4(4), *Research in Applied Economics*, 2012, 13.

⁴⁷ Siddiqui K, ‘Developing Countries’ Experience with Neoliberalism and Globalization’ 4(4), *Research in Applied Economics*, 2012, 15.

Neoliberalism, as a theory of economics and also as a policy stance, purports that an unregulated system of capitalism such as a free market economy is the most ideal kind of system. It is the idea of free individual choice backed by the lack of any regularity barriers that allows such a system to prosper.⁴⁸ At the international level, neoliberalism is illustrated by the free movement of goods, services, capital, and money across national boundaries.⁴⁹ According to the theory, States are to ensure there is free trade in services and goods among others and that the State ought to limit any stringent regulations and barriers. In that regard, this study argues that the State ought to streamline the existing regulations in Kenya so as to promote equal access to the labor market by PWDs.

2.2.2 The Inclusion Theory

The inclusion theory advocates for the involvement and treatment of all equally in a society. The theory of inclusion is not a new phenomenon and has gone a long way to being what it is now.⁵⁰ Inclusion was seen as a new platform from which democratic attributes, that would in turn allow for disability and the concept of equality, to be accepted within the cultural normality.⁵¹ This theory would depict a socially inclusive society where all people feel valued, their differences are respected, and their basic needs are met so they can live in dignity.⁵² As such, a socially inclusive society is a society where all people are recognized and accepted and have a sense of belonging.⁵³

2.3 Conclusion

It is therefore for the Kenyan government to ensure PWDs have free and easy access to the labor market without any barriers or unjustifiable restrictions or without any discrimination or exclusion. This study thus argues in support of the inclusion of PWDs in the labor market.

⁴⁸ Kotz D, 'Globalization and Neoliberalism' 12(2), Rethinking Marxism, 2002, 65.

⁴⁹ Kotz D, 'Globalization and Neoliberalism' Rethinking Marxism, 65.

⁵⁰ Hodkinson A, 'Inclusion: A Defining Definition?' 3(2), SAGE Journals, 2011, 180.

⁵¹ Hodkinson A, 'Inclusion: A Defining Definition?' SAGE Journals, 180

⁵² Robo M, 'Social Inclusion and Inclusive Education', *International Scientific Journal*, 2014, 191.

⁵³ Robo M, 'Social Inclusion and Inclusive Education', *International Scientific Journal*, 2014, 191.

CHAPTER 3

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING PERSONS WITH DISABILITIES IN SECURING EMPLOYMENT IN KENYA

3.0 Introduction

This part of the paper describes and gives an analysis of the legal and institutional framework with regards to PWDs in accessing employment in Kenya. It addresses the national framework and other international legal obligations of the state and thereafter, the institutional structure.

3.1 Legal framework

3.1.1 National laws

a. The Constitution of Kenya 2010

Throughout the text of the Kenyan Constitution 2010, values of equality and non-discrimination are encouraged, a feature which was unlike the previous Constitution of 1963. When compared with the earlier constitution, the list of protected persons is seen to have been substantially increased. It did not allow for the protection of women and on the grounds of age and disability. This meant that PWDs who faced discrimination could not find justice in court. This was what was seen in the case of *Duncan Otieno Waga v hon. attorney general* where the petition was dismissed.⁵⁴ However this has long changed as the new Constitution 2010 now protects persons on 16 different grounds, ranging from race to disability.

Equality is first mentioned in the preamble of the Constitution of Kenya 2010. It is mentioned as one of the values that a government should be based on. This same principle is again stated in Article 10(b). This is further emphasized in Article 20(4) (a). This particular article provides for equality and equity as values to be promoted. Further to this Article 21(3) creates an obligation on the state to address the needs of “vulnerable groups” in the public eye. Out and out, Chapter Four states that the rights and fundamental freedoms in the Bill of Rights belong to each individual,⁵⁵ and that every person shall enjoy the rights and fundamental freedoms in the Bill of

⁵⁴ The definition of discrimination at section 82(3) of the repealed Constitution was limited to classifications of "race, tribe, place of origin or residence or other local connexion, political opinions, color, creed or sex." There was no protection for discrimination on account of disability.

⁵⁵ Article, 19(3), the Constitution of Kenya (2010).

Rights to the greatest extent consistent with the nature of the right or fundamental freedom.⁵⁶ These rights are therefore extended to PWDs.

Article 27 speaks more broadly on equality and non-discrimination. A closer look of the provision reveals that Article 27(4) prohibits discrimination on specific grounds. Of importance to our discussion is the ground on disability which is clearly stated in this section. The framers of the Constitution can perhaps be applauded for such deliberate and obviously a bold move that led to an express recognition of the rights of PWDs. It is a generally acknowledged principle that in order to protect the rights of the marginalized or of minority groups, the first step is the recognition of such a group. That the Constitution has achieved.

There are cases that have emerged with regards to such form of discrimination. However these cases are almost negligible and a sound precedential system has not been set to deal with such matters of discrimination. In this rare instance, there is a case that exemplifies discrimination on the basis of disability that case is of *Fredrick Gitau Kimani v The Attorney General*.⁵⁷ Where the Petitioner contended that the early retirement amounted to discrimination on the grounds of inter alia disability which was a direct violation of article 27(4) of the Constitution as read with section 15(6) of the Persons with Disabilities Act. The Court held that the Petitioner was discriminated against and was awarded him damages. There is need for increased strategic litigation and judicial activism to enhance the fight against discrimination in Kenya. Anti-discrimination laws provide a pedestal upon which precedents may be laid and within which clear standards and burden of proof can be developed.⁵⁸

Articles 27 (4) and (5) provide for the protection against both direct and indirect discrimination. However the Constitution lacks a definition of these two critical terms.

Article 27(6) creates a duty of affirmative action which is generally an obligation of governmental policy regarding minorities in society. Further to this, Article 56 gives extra insurance to “minorities and marginalized groups”, a classification which encompasses all those

⁵⁶ Article 20(2), the Constitution of Kenya, (2010).

⁵⁷ *Fredrick Gitau Kimani v The Attorney General* (2012) eKLR.

⁵⁸ Kenya Human Rights Commission, *Towards Equality and Anti-Discrimination: An Overview of International and Domestic Law on Anti-Discrimination in Kenya*, 25th January 2010, P.14.

vulnerable to discrimination. Article 27(4) provides for the state to undertake measures including affirmative action to ensure the participation of these groups in governance, education and employment, to have access to water, health services and infrastructure, and to develop their cultural values, languages and practices.

Article 54 focuses on the rights of PWDs. It provides that PWDs should be given access to educational institutions and facilities and to reasonable access to all places, public transport and information. This speaks to the idea of reasonable accommodation of PWDs.

It is keen to note that neither Article 27 nor Article 54 adequately cover the idea of reasonable accommodation. These sections do not define a failure to make reasonable accommodations as a form of discrimination or grant a general right to reasonable accommodations outside specific areas. This right is key in ensuring that PWDs have access to employment in instances that they ordinarily would not have.⁵⁹ Therefore persons cannot make a civil claim against employers and other persons who fail to create such reasonable accommodations.

b. Persons with Disabilities Act⁶⁰

The Persons with Disabilities Act is an appreciated endeavor to forbid discrimination against and promote equality for PWDs. It prohibits direct discrimination in employment, admission to learning organizations, and access to premises, services and amenities. Significantly, the Act establishes the NCPD,⁶¹ and gives it the ability to issue adjustment orders in respect of accessibility to the owners of premises and providers of amenities and services.⁶²

The most relevant parts to our present discussion are Section 15(1) of the Act which prohibits discrimination by both public and private employers in all areas of employment and the need to make reasonable accommodation; Section 15(2) which relates to instances where an act or omission was not wholly or mainly attributable to the disability of the person. This particular

⁵⁹ Article 5(3) *United Nation Convention for Persons with Disabilities*.

⁶⁰ The Persons with Disabilities Act (No. 14 of 2003).

⁶¹ Section 3(1). Persons with Disabilities Act.

⁶² Section 24, Persons with Disabilities Act.

section however fails to address cases in which disability played a smaller role or just a portion of the role in which there was discrimination experienced in employment.

The Act provides incentives favoring the employment of disabled persons, by making employers of PWDs eligible for tax incentives.⁶³ In addition, section 13 requires that the NCPD reserve 5% of work positions in the public and private sectors for PWDs. The Act also exempts PWDs from income tax.⁶⁴

Section 25(1) (b) of the act provides protection from discrimination in access to places and services, though it is not without problems. These problems include that the prohibition is limited to direct discrimination, including neither indirect discrimination nor failure to make reasonable accommodation. Lastly, the protection is limited to cases where denial of access is based on “disability alone”, a serious limitation which excludes all cases where disability is a factor in decisions about access.

The absence of provisions defining a failure to make reasonable adjustments as discrimination is addressed to some extent through powers of the NCPD. Sections 22 and 23 require that all public buildings and public service vehicles “shall be adapted to suit persons with disabilities in such manner as may be specified by the NCPD.” However this makes the process through which such adjustment orders take longer as the NCPD has to get consent from the minister involved.

c. Employment Act⁶⁵

The Employment Act 2007, which governs all forms of employment, provides for the protection of PWDs from discrimination within employment. The relevant sections are Section. 5(3) which prohibits discrimination on grounds of, inter alia disability; Section 3 which provides for the prohibition of discrimination in both public and private sectors of employment.⁶⁶ This prohibition applies more specifically to the process of recruiting individuals for employment, the training of such persons, the termination of the employment relationship between such persons

⁶³ Section 16, Persons with Disabilities Act.

⁶⁴ Section 25, Persons with Disabilities Act.

⁶⁵ Employment Act (No.11 of 2007).

⁶⁶ Section 3(1), Employment Act.

and other relevant concerns related to employment.⁶⁷ The scope of protection therefore is extended to employees and applicants for employment.⁶⁸ This Act is a welcomed attempt at the protection of PWDs at work.

3.1.2 International legislation

a. The UN Convention Rights for Persons with Disabilities⁶⁹

Having ratified the CRPD, Kenya got a range of responsibilities. Some of these responsibilities, critical to the present paper, are those including the adoption of legislation and other administrative matters that are deemed necessary and the inclusion of disability in all relevant policies and programs. It follows that the legislation enacted in Kenya, in relation to the PWDs, must adhere to the various article and demands of the CRPD. The Constitution of Kenya 2010 has more than done this. However, the Persons with Disabilities Act came to law at a time that the CRPD had not yet been ratified. Therefore its reform is needed so as to streamline its ideas with those of the CRPD.

3.2 Institutional framework

3.2.1 The Government

Government refers to the institutional framework that administers the affairs of the people in a particular country. The government of Kenya plays a critical role in curbing discrimination of PDWs in accessing employment opportunities. The role of government in promoting equal opportunity in accessing employment opportunities is shown in their enactment of laws and the creation of institutions to perform various tasks in regards to that.

The Government has established various bodies in order to curb discrimination in the access of employment opportunities for PWDs. Some of these institutions include the NCPD. In addition there are Ministries such as the Ministry of Labor, Social Security and Services and The Ministry of Gender, Children and Social Development that have specific aims of protecting the rights and development of PWDs. There are also commissions set up in this same vein such as The

⁶⁷ Section 5(3) (b), Employment Act.

⁶⁸ Section 5(8) (a), Employment Act.

⁶⁹ *United Nations Convention for the Rights of Persons with Disabilities*, 2006.

National Gender and Equality Commission and The Kenya National Commission on Human Rights commission.⁷⁰ But there is a clear lack of cohesion between these various bodies.

3.2.2 Organizations of persons with disabilities

The UDPK is the central coordinating organization made up of smaller organizations known as DPOs. UDPK aims at promoting equality through legislative material and awareness raising.⁷¹ Other organizations include the Handicapped Mobility Appliances Centre, Kenya Disabled Development Society and Leonard Cheshire Disability.

There is notably a lack of a harmonization from the DPOs. DPOs tend to organize by the type of disability that they advocate for and they work solely on these lines. In addition these organizations lack the knowledge on the CRPD that is required to further their aims. Finally there is lack of resources and technical capacity by DPOs to conduct research that can inform the implementation of the CRPD.⁷²

3.3 Best practices from other jurisdictions

This part examines anti-discrimination practices in other jurisdictions and seeks to explore the lessons that Kenya can draw from those jurisdictions. America and The United Kingdom are examined.

3.3.1 America

The main legislation governing matters concerning employment of PWDs is the ADA.⁷³ It prohibits discrimination in various areas of employment and in addition to that it provides for a prohibition on discrimination in public accommodations, commercial facilities, transportation, and telecommunications.⁷⁴ More specifically the Act guarantees accessibility for PWDs in employment to equipment and services that are offered to the general public. All these areas are seen to be important areas of accessibility and equality so as to allow PWDs to live independently.

⁷⁰McGurk H, Disability in Kenya: A case study and country report Disability Rights and the International Policy Context (SLSP 3120), 12.

⁷¹ Kamundia E, African Disability Rights Yearbook, 2014, 194

⁷² Kamundia E, African Disability Rights Yearbook, 2014, 199.

⁷³ Americans with Disability Act, 1990.

⁷⁴ Section 12102, Americans with Disability Act.

The employment area of the Act requires that PWDs have an equal opportunity for jobs for which they are qualified.⁷⁵ This in turn means that employers must make prescreening and hiring practices accessible. Finally there are channels created to assuring that failure of the creation of reasonable accommodation is dealt with as this is seen as a form of discrimination in itself.

3.3.2 United Kingdom

The DDA in the United Kingdom gives PWDs rights in the areas of employment, obtaining goods and services, and buying or renting land or property. The DDA was repealed when the Equality Act came into play in 2010. The Act aims at curbing discrimination by harmonizing discrimination law and strengthening the law to support progress on equity.⁷⁶ The Act includes provisions that when a person with a disability has been denied employment by virtue of his or her impairment, he or she can take the matter to court on the strength of the Act and allege that they have been discriminated against.⁷⁷

In addition, the employer is under legal obligation to provide reasonable accommodation in order to allow PWDs to complete the application process for a job.⁷⁸ This allows all persons reaching for the position, an equal competitive edge.

3.3.3 Lessons learnt from the comparative study

Both The United States and The United Kingdom employers are taking measures to make reasonable accommodation adjustments required by the law. This is assured by the legal framework which gives PWDs the right to make civil claims against persons who fail to make reasonable accommodation for their employees. In addition, punishments such as the payment of fines are used as a means through which adherence to the law on disability is maintained.

3.4 Conclusion

This chapter has discussed the legal framework governing PWDs in Kenya. It has illustrated how the laws have accorded PWDs protection with regards to the access of employment and the various loopholes within the law. Also the institutional framework and its inadequacies has been discussed with regards to the access to employment.

⁷⁵ Title I, Americans with Disability Act.

⁷⁶ Section 14, Equality Act, 2010.

⁷⁷ Civil Courts, Chapter 2, Disability Discrimination Act.

⁷⁸ Schedule 21, Disability Discrimination Act.

Lessons from the best practices segment reveal the importance of the accommodation of PWDs. Such accommodation is seen as a right that is accorded to the PWDs and as such civil claims may be made in the respective bodies for failure of such. Kenya should borrow a leaf from these practices by constructing the law in such a manner that failure to make reasonable accommodation results in appropriate sanctioning.

CHAPTER 4

CONTEMPORARY CHALLENGES FOR PERSONS WITH DISABILITIES

4.0 Introduction

At this juncture, the paper addresses various issues related to the inclusion of PWDs to the employment sector. PWDs are seen to be greatly disadvantaged in the labor market and as a result, are excluded from it. This may be ascribed to different reasons which shall be discussed below.

4.1 Issues arising

As earlier discussed, the legal framework in Kenya has created an environment where PWDs are presumably able to access and secure employment without being prevented from doing so. This is done with the aim of creating an equal and non-discriminatory environment where all persons can access employment on an equal playing field. It is however critical to note that the number of PWDs in employment is acutely smaller than those without a disability in employment in Kenya. This disparity may be attributed to various reasons such as the lack of reasonable accommodation, the prevalent negative stigma surrounding PWDs by employers and the like. This paper shall herein take a critical account of some of the various reasons why PWDs despite being assured employment by the existing legal framework, still lack the surety of access to employment.

4.1.1 Reasonable accommodation.

Reasonable accommodation can be seen as any alteration or change made to the work environment with the aim of allowing the ease of use and full participation of employed persons who are disabled. It can vary from the change made to the process of application or the actual environment of the work place. It aims at enabling PWDs to fully participate in the work space and allows him or her to perform the essential tasks that are associated with the job to be done. This idea of reasonable accommodation also allows PWDs to enjoy the entire work experience.⁷⁹ This could be manifested in the simplest of things such as restructuring a job to enable PWDs to work efficiently, modifying work schedules to include any special needs and acquiring or modifying equipment to allow PWDs to work well.⁸⁰

⁷⁹ Subchapter 1, Americans with Disability Act.

⁸⁰ https://www.ada.gov/hiv/ada_q&a_aids.htm. Last viewed 1/16/2017.

In Kenya, reasonable accommodation is mentioned in the Persons with Disabilities Act. This idea is discussed in both sections 22 and 23 of the Act. These sections require that all public facilities mentioned “shall be adapted to suit PWDs in such manner as may be specified by the NCPD”. Furthermore, the NCPD has a power to issue an adjustment order for any premises, service or amenity which the council deems to be inaccessible to PWDs by reason of any structural, physical, administrative or other impediment.⁸¹

There are however some restrictions that exist with regards to public services. This restriction is manifested in the inability of the NCPD in issuing adjustment orders as against any public health facility or education or training institution without the consent of the relevant government Minister. This means that NCPD cannot issue an adjustment order to any hospital or medical facility under the control of the Government or registered under the Public Health Act or to any educational institution under the control of the government or registered under the Education Act, except with the consent of the Minister responsible for the institution or Act concerned.⁸² This restriction may not on the face of it seem to be a restriction as such but in many cases it seems difficult to justify. PWDs, like any other persons should be able to freely access such places be it for purposes of ease of work or the mere access to such services and attaining such consent would prolong the wait to such access.

Further PWDs cannot make a civil claim in respect of a failure to adjust infrastructural settings. The CRPD defines discrimination as any distinction that includes all forms of discrimination, including denial of reasonable accommodation. This part therefore is contrary to the already ratified treaty that should allow PWDs to make civil claims on the grounds of failure to create reasonable accommodation.

Reasonable accommodation has further implications on the employee with disability, the employers and the state. These are:

a. Assistive services

Assistive services are initiatives or support offered to PWDs within the society so as to enable them access to facilities and ease of usage of services. These services may range from relatively minor and inexpensive support initiatives to major and costly ones. These

⁸¹ Section 7(a) and 24 Persons with Disabilities Act.

⁸² Section 27, Persons with Disabilities Act.

services aim at allowing PWDs to live life on an equal basis with other persons who do not have a disability. For many PWDs, these assistive services, be they for the blind, deaf or physically incapacitated, are prerequisites for the full participation in society and more importantly in the work environment.⁸³

Examples of how assistive services and persons aid PWDs are for example a sign language interpreter assisting a Deaf person to work in any ordinary work environment or a personal assistant aiding a person using a wheelchair to travel to meetings or work.⁸⁴

These individuals are therefore given an opportunity to live in the community as fully participatory persons, rather than be marginalized.⁸⁵ These assistive services should be made mandatory for employers in private sectors that offer services to the public and government bodies in the public sector to implement.

b. Enabling environment

Environments, whether physical or social, have both a positive and negative effect on PWDs by either fostering their participation or making them even more marginalized. For instance, transportation allows a persons to get to work.⁸⁶ In addition, access to buildings, is beneficial for the participation in civic life and essential for, among other things, the participation in the labor market. This list goes on to other public amenities and services and private structures open to the public. Therefore it is important to create an environment around PWDs that allows them to have a positive outcome. Further to this, the CRPD illustrates the significance of interventions to enhance access to various domains of the environment including structures such as buildings, transportation, data and correspondence.⁸⁷ It is therefore greatly important for the environment to be made in such a way to better suit the access and ease of work of PWDs.

⁸³ Improving the Employment participation of people with Disability in Australia discussion paper, WISE Employment submission, 2013, 4.

⁸⁴ Verdonschot M et al. Community participation of people with an intellectual disability: a review of empirical findings. *Journal of Intellectual Disability Research: JIDR*, 2009, 53.

⁸⁵ Takamine Y. The cultural perspectives of independent living and self-help movement of people with disabilities. *Asia Pacific Journal on Disability*, 1998.

⁸⁶ Babinard R. *Transport strategy to improve accessibility in developing countries*. Washington, World Bank, 2005.

⁸⁷ Article 9, United Nation Convention on the Rights of Persons with Disabilities.

c. Cost of disability

The monetary and social expenses of incapacity are huge on-screen characters in the entrance to work for PWDs. They incorporate immediate and backhanded expenses that maybe borne on various people who are seen to be relevant tin the lives of the PWDs.⁸⁸ those particularly borne on the employer may discourage such employers from employing PWDs due to the cost implications.

However a considerable amount of expenses are necessary to making adjustments necessary for an ideal work environment for PWDs. This refers to measures with fiscal implications that should and are sometimes taken up by employers to help PWDs work or to take part in training on the same basis as individuals without disability. Therefore the laws must take this into consideration, allowing for incentives and subsidies for employers and families of PWDs.

4.1.2 Lack of qualification

Matters concerning employment are regulated by the Employment Act Chapter 226 of the Laws of Kenya.⁸⁹ These matters are further governed by the contract of employment which both the employee and the employer must enter before such relationship can fully function. This contract stipulates employment particulars such as, but not limited to, the job description of the employment, hours of work, remuneration details, notice period for termination of contract and the like.⁹⁰ Notably and of great concern, the Act does not define what employment is. The J Collins English Dictionary⁹¹, defines employment as the act of employing an individual who is qualified to occupy a particular position for the sole purpose of discharging functions as espoused in the contract agreement. The relationship is premised on the mutual understanding between an employee and the employer that the employee shall hold such qualification without any lack thereof. This is where the issue begins.

For the most part, businesses don't contract specialists with handicaps. They have a tendency to segregate them on the supposition that they can't perform basic capacities in the same

⁸⁸ *World Report on Disability*, World Health Organization, 2011.

⁸⁹ Employment Act (No.11 of 2007).

⁹⁰ Elliot C and Quinn F, *Contract Law*, 2007, 3.

⁹¹ J Collins, *English Dictionary*⁹¹, 10th ed.

class as their associates who don't have a handicap. Most businesses are inclined toward workers that are adaptable and ready to accomplish more than one errand.⁹²

Misguided judgments harbored by the businesses, different workers and the overall population creates this attitude that sees PWDs as peons. This disposition is introduced on the possibility that PWDs are not profitable people. This is as a rule based in opposition to the way that these PWDs have experienced tertiary instruction and procured the proper capabilities and the fundamental aptitudes for the occupation. In addition, potential bosses frequently see them as unequipped for achieving undertakings. In a few circumstances, businesses may even dread PWDs as representatives, not comprehending what to state when they meet them in the workplace or they may likewise expect that their clients or customers are not happy with workers with incapacities.⁹³

This attitudinal bias goes deeper than the implementation of new laws. The public needs to be sensitized on the idea of disability so as to change their perception that disability is inability.

Some of the implications related to the perception of the lack of qualifications include:

a. Education

Education involves key aspects of training and schooling. These aspects are imperative elements that any individual seeking employment would consider to be essential for effective work.⁹⁴ However PWDs in most cases lack access to education.⁹⁵ The gap in instructional attainment amongst those with a disability and those without is hence an ever-growing obstacle leading to the disparity between the numbers of those in employment with disabilities and those without disability.⁹⁶ This means that some of the PWDs who would like to access employment are excluded from work by the clear lack of qualification. This does not always happen. But as discrimination begins from childhood, opportunities such as those of education and training are near impossible to attain.

⁹² Mapuranga B and Mutswanga P, The Attitudes of Employers and Co-Workers towards the Employment of Persons with Disabilities in Zimbabwe, 2(3), *International Journal on Managerial Studies and Research (IJMSR)* 2014, 8.

⁹³ Mapuranga B and Mutswanga P, The Attitudes of Employers and Co-Workers towards the Employment of Persons with Disabilities in Zimbabwe, 2(3) *International Journal on Managerial Studies and Research (IJMSR)*, 2014, 13.

⁹⁴ *Skills development through community-based rehabilitation*. Geneva, International Labor Organization, 2008.

⁹⁵ Russell C. *Education, employment and training policies and programs for youth with disabilities in four European countries*. Geneva, International Labor Organization, 1999.

⁹⁶ *People with disabilities in India: from commitments to outcomes*. Washington, World Bank, 2009.

b. Stereotypes and misconception

A stereotype maybe viewed as a system of social classification, which has the capacity to be deceptive, as it does not endorse variable reality.⁹⁷ PWDs, in most cases, have the right set of qualifications and educational background but due to stigma and misconceptions within the minds of potential employers, employment opportunities become limited and they face exclusion form this sector almost entirely.

The root of these ideals many vary. Some employers may deliberately exclude PWDs from employment because they simply do not wish to include them in their work force⁹⁸ a reason which does not stand from the justifiable point of a lack of qualification. This clearly needs some form of regulation. However, a more fundamental step of sensitizing people within the employment sector of the damaging implications of such misconceptions should be done first. There after the law maybe worded in such a way as to curb this form of discriminatory exclusion.

4.1.3 Stigma and ignorance

Stigma is generally defined as the mark of disgrace with a particular circumstance, quality or person.⁹⁹ It ordinarily has the negative effect of leaving persons facing such stigma excluded from their own community. This also can leave such groups of persons marginalized and more vulnerable to the effects of inaccessibility of employment opportunities. It also has an effect of discouraging and eventually stopping individuals with ability from seeking and attaining jobs they are qualified to do. This lack of a means to earn a livelihood makes such persons increasingly dependent on state benefits or on their families.¹⁰⁰

a. Empowering PWDs

There is need to understand the concept that PWDs have to be enabled in such a manner that allows them to exercise their rights, specifically in the subject of employment. They need to have same possibilities for productive and gainful employment in labor markets. This can be

⁹⁷ Nolan T, Hands .E., Ogunkolade W and Bustin A: an assay for the detection of inhibitors in nucleic acid preparations. *Anal. Biochem*, 2006, 351.

⁹⁸ Waghorn G and Lloyd C. The employment of people with mental illness. *Australian e-Journal for the Advancement of Mental Health*, 2005, 4.

⁹⁹ <https://en.oxforddictionaries.com/definition/stigma> Last viewed 1/14/2017.

¹⁰⁰ McKeever, R (2006) Rethink Anti-Stigma Campaign in Northern Ireland: Public Information Sheet on what is stigma (www.rethink.org). Last viewed on 1/14/2017.

done through sensitizing them on their rights and promoting the full participation in the development of policies and practices relating to employment rights.

4.2 Conclusion

These aspects depict how PWDs are still not freely accessing employment.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

6.0 General conclusion

The general conclusion is that PWDs are naturally like everyone else. In a bid to sustain themselves and those under their care, they, like everyone else, seek employment opportunities to advance their economic prospects. We have however come to see that in the process of acquiring employment, they face discrimination by the mere fact that they have a disability. The law is therefore useful and necessary in curbing this sort of discrimination against PWDs.

6.1 Recommendations

1. Need for ease of reasonable accommodation measures

The state should take initiatives to obligate employers to make reasonable accommodation for PWDs. This may be done by increasing accessibility and work place participation.

2. Need for inclusion of civil suits on the grounds of failure to make reasonable accommodation

The failure to make reasonable accommodations is not seen or described in the legislative texts discussed above as a form of discrimination. It should therefore be recognized as such. This would mean that employers and other persons who fail to make such reasonable accommodation should face punishment.

3. Creation of tribunals for PWDs

It is recommended that the Persons with Disabilities Act be amended so as to create the tribunal for PWDs. This will make it cheaper, affordable, flexible and easier for PWDs to have their issues resolved effectively. This recommendation can be seen as a step further from including civil claims on the basis of a failure to afford reasonable accommodation. This research recommends that the jurisdiction of the tribunal should be:

- i. To inquire in any dispute relating to disability discrimination under the Persons with Disabilities Act.
- ii. To make decisions relating to disability discrimination under the Persons with Disabilities Act.
- iii. To enforce such decisions relating to disability discrimination under the Persons with Disabilities Act.

4. Challenging myths and attitude

PWDs with disabilities like others seek and obtain qualifications in abide to gain employment. However most employers tend to be reluctant in employing them because of mythologies particularly that they are not productive. Therefore the government and other relevant authorities should take the necessary steps in assuring that the society is made aware about PWDs' rights, needs, potential and their contribution.

5. Need for up to date records

The government of Kenya with the aid of its various bodies such as the NCPWD should create a system of record. A data base should be created for PWDs so as to have and maintain details of importance such as the individuals' skills, education, and professional experience. Such information is useful as it can easily be shared with potential employers.

6. Non-governmental organizations should coordinate

There ought to be proactive targeting of DPOs by way of state corporations, amid the execution of approaches and capacity development of DPOs on the grounds of the CRPD. In addition, there should be more noteworthy and more viable collaboration amongst and between DPOs and other institutions catering to PWDs. Finally there should be initiatives in funding research projects by the DPOs that can provide evidence based information for further initiatives.

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